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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1045

LOUIS D. REED, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No.

LOUIS D. REED, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner, LOUIS D. REED, by and through his counsel of record, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on October 2, 1967. Said judgment affirmed *per curiam* the judgment of the District of Columbia Court of Appeals, entered February 15, 1967.

OPINIONS BELOW

The opinion of the District of Columbia Court of General Sessions is unreported. It is set forth at page 25 of the Joint Appendix (R. 1), and is appended to this Petition at p. 14.

The opinion of the District of Columbia Court of Appeals is reported at 226 A.2d 581. It is quoted at pages 33 - 36 of the Joint Appendix (R. 1), and also is appended to this Petition at pp. 15-18.

The judgment *per curiam* of the United States Court of Appeals for the District of Columbia Circuit, entered below without opinion, is unreported. The contents thereof are quoted in the Appendix hereto at p. 19.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was made and entered on October 2, 1967 (R. 2). A petition for rehearing *en banc* thereon was denied by the Court of Appeals on December 22, 1967 (R. 3). Said judgment and denial order are appended to this Petition at pages 19 and 20, respectively.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

At the trial of Petitioner on the charge of committing certain indecent acts of a homosexual nature, the only substantive evidence offered by Respondent was the uncorroborated testimony of the arresting officer. Said arresting officer had failed to detain and identify a material witness to Petitioner's alleged offense. Thus Petitioner was deprived of any opportunity to utilize the testimony of such material witness at the trial.

The arresting officer and one of the pair of other policemen who accompanied Petitioner to headquarters testified

at the trial that Petitioner was "advised of his rights" while they were en route to headquarters in a patrol car, and that, immediately thereafter, he admitted having committed the offense charged and such admission of guilt was repeated by Petitioner at headquarters.

Petitioner, in his testimony, vigorously denied: (1) that he committed the offenses charged; (2) that he had been "advised" by the police "of his rights" either in the patrol car or at headquarters; and (3) that he had ever admitted having engaged in the homosexual acts alleged by the arresting officer. Petitioner also testified that he had been told by the police that he could have no one come to headquarters to be with him.

Petitioner's then counsel, for strategic reasons, did not object at the trial to the receipt of testimony by the arresting officer and his associate relating to Petitioner's alleged admission of guilt, since Petitioner expressly denied such guilt, and having made any such admission. Nor did trial counsel object to police testimony regarding the "advice" allegedly given to Petitioner "as to his rights", which Petitioner denied having received.

The questions presented are as follows:

1. Whether Petitioner was not accorded a fair trial, in violation of his Constitutional right to due process of law, because of Respondent's failure to ascertain and to make available to him the identity and whereabouts of a material witness to the alleged offenses.

2. Whether Petitioner's alleged admission of guilt, which he denied making, was, if made, unconstitutionally extracted from him by the police officers of the Respondent.

3. Whether the inaccessibility to Petitioner of legal counsel prior to the alleged admissions was violative of the Sixth Amendment, as pronounced by this Court in *Escobedo v. Illinois*, 378 U.S. 478 (1964).

4. Whether the failure of the police officers to testify at the trial as to the nature of their purported "advice" to Pe-

titioner "as to his rights" violated the Constitutional principles pronounced in *Miranda v. Arizona*, 384 U.S. 436 (1966), decided and handed down only several weeks after the trial herein.

5. Whether Petitioner's attorney, not having raised at the trial the questions of admissibility in evidence of police testimony regarding the alleged admissions, the inaccessibility of legal counsel, and the coercive circumstances surrounding both, Petitioner was properly precluded by waiver or otherwise from raising these Constitutional issues on appeal.

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

The pertinent portions of: the Fifth and Sixth Amendments to the Constitution of the United States; Section 22-1112(a) of the District of Columbia Code; and Federal Rule of Criminal Procedure 52(b), are set forth in the Appendix at pp. 21-22.

STATEMENT

The Petitioner on the evening of January 13, 1966, at approximately 8:40 o'clock, was arrested in the men's room on the fourth floor of the Woodward and Lothrop Department Store in downtown Washington by an officer in plain clothes assigned to the Morals Division of the Metropolitan Police Department [JA 2, 5].

Petitioner was tried in the Criminal Division of the D. C. Court of General Sessions on May 12, 1966, on the charge of "Indecent Act" [JA 1-25]. Petitioner took the witness stand at the trial, and, among other things, admitted his presence in the men's room of Woodward and Lothrop on the evening of January 13, 1966 [JA 10], having arrived there at approximately 8:00 o'clock. He had been directed to the fourth floor men's room by a store clerk, after having experienced an urgent need to move his bowels while approaching Woodward and Lothrop. [JA 10-11]

Petitioner testified that he had severe diarrhea, cramps and rumbling, and thought he would wait a minute or two before leaving the rest room. He had no further bowel movement, but did need to urinate, and therefore went over to a urinal to relieve himself. As he was leaving the urinal to depart from the rest room, a person stopped him by standing in front of the exit and blocking his way. Petitioner said to him, "Come on!", and the other person responded with, "Don't give me any trouble. I don't want to use the handcuffs again tonight", to which Petitioner replied, "What do you want?" He answered, "You will have an opportunity to talk about this when we get to the Police Station" [JA 10-12].

When the police officer had entered the men's room, there was also another person—a second, unidentified white male—standing at the urinal [JA 2]. This other white man shortly thereafter was permitted by the arresting officer to leave the men's room without identifying himself, immediately following the alleged commission of the homosexual offenses by the Petitioner. [JA 2-4, 24] The arresting officer said nothing to this other man, and made no effort to stop him when he was leaving [JA 3]. A police lieutenant and a private were outside of the door of the men's room when this unknown person left the scene, and they met the Petitioner there when the arresting officer brought him out of the men's room [JA 2, 3, 7]. Immediately upon being placed under arrest, the Petitioner became very nervous. [JA 2].

The three policemen then escorted the Petitioner to a police cruiser to drive him to police headquarters [JA 3]. The arresting officer sat in the back seat of the cruiser with the Petitioner, and the other two officers sat in front [JA 4-5]. While the car was moving, the arresting officer purportedly "advised the defendant (Petitioner) of his rights" [JA 3, 5, 7]. This the Petitioner categorically denied [JA 12]. Also, during the ride to police headquarters, the arresting officer allegedly recited the facts of the case in the presence of the

Petitioner and the two other policemen, and asked Petitioner whether the facts he had recited were correct or incorrect, to which Petitioner purportedly answered, according to the policemen, that they were true [JA 3, 5, 7], but which Petitioner likewise denied [JA 12].

Upon arriving at police headquarters, Petitioner was informed by the arresting officer that he was charged with "Disorderly Conduct for Loitering." Petitioner asked him what this implied and what the reason was, and the officer answered, "You know the reason." He then told Petitioner that he would not be able to have anyone come into the police station to be with him, but that he would be able to make telephone calls, if necessary [JA 12-13]. Petitioner subsequently phoned his brother, who came down to headquarters and gave him the $25.00 required for collateral; Petitioner and his brother then left [JA 13].

Petitioner is married and his wife was then pregnant (she subsequently gave birth to a girl on June 21, 1966). Petitioner is employed by a Federal Government agency, where he is a consultant in speech pathology and audiology. He holds a Bachelor of Science Degree and a Doctor of Science Degree in the subjects aforesaid and environmental medicine [JA 9]. He had never been arrested before for any cause. [JA 6], and received an Honorable Discharge from the Navy [JA 13]. Four (4) character witnesses – one (1) M.D., and three (3) Ph.D.'s – took the stand in Petitioner's behalf at the trial, each of whom testified unequivocally as to Petitioner's professional expertise, his excellent general reputation for truth and veracity, and his reliability under oath [JA 14-23].

After closing arguments on behalf of the Respondent and of the Petitioner [JA 23-24], the Trial Court adjudged the Petitioner guilty as charged, and imposed a fine of one hundred dollars ($100.00) or thirty (30) days in jail [JA 25, 27].

From this conviction of having committed an "Indecent Act", the Petitioner appealed to the District of Columbia

Court of Appeals [JA 27-29]. The conviction was affirmed on February 15, 1967, as stated above [JA 32-37 and Appendix pp. 15-18].

The U. S. Court of Appeals affirmed the D. C. Court of Appeals by *per curiam* order, dated October 2, 1967 (Appendix p. 19). A petition for rehearing *en banc* was denied by the U. S. Court of Appeals on December 22, 1967 (Appendix p. 20).

REASONS FOR GRANTING THE WRIT

There exist several compelling reasons why the protection of the Constitutional rights of an accused and the furtherance of criminal justice require the granting of a writ of certiorari in response to this Petition. –

The Petition presents serious and important questions relating to the Constitutionality of law enforcement techniques employed by the police in obtaining the conviction of Petitioner and other persons who allegedly solicit an arresting officer in plain clothes to engage in indecent acts of a homosexual nature in violation of the D. C. Code and similar laws.

The nature of the criminal charge in this and comparable cases brings about far greater consequences than the short jail sentence and small fine imposed would seem to indicate. The reputations and careers of the Petitioner, and men like him of extensive education and established professional position in the community, can be completely destroyed by the *mere accusation* of having engaged in such homosexual activity in a public place.

The number of arrests each year in the District of Columbia and other jurisdictions, and the number of lives and reputations at stake, merit the careful consideration by the Supreme Court of the United States of the erroneous aspects of the opinion of the District of Columbia Court of Appeals, and of the summary disposition made of the further appeal by the United States Court of Appeals for the District of Columbia Circuit.

The following serious judicial errors, which were committed herein by the trial judge and the two appellate courts, provide ample reason for granting the writ of certiorari here being sought, viz. –

It was the clear duty of the arresting officer in this case to ascertain and preserve the identify of the third person who was present at the scene of the alleged indecent act. The failure of Respondent to observe such duty, and thus to have afforded Petitioner an opportunity to avail himself of the testimony of this material eye and ear witness at the trial, if he desired to utilize it, deprived said Petitioner of a fair trial, and thus of his Constitutionally guaranteed right to due process of law.

Surely, if the Government has a duty to disclose the identity of an informer who may be helpful to the defense, as prescribed by *Roviaro v. United States*, 353 U.S. 53 (1957), the Government *a fortiori* has an even higher duty to preserve and disclose the identity of a witness who may possess similar information, but on whose behalf the Government is not in a position to claim privilege.

Where testimony from a more disinterested source is available, there should be a reluctance on the part of the courts to permit the establishment of facts crucial to criminal guilt solely by police testimony based on a single observation. The Supreme Court has recognized the basis for such reluctance in *Johnson v. United States*, 333 U.S. 10, 14 (1948), when it speaks of the "often competitive enterprise of ferreting out crime."

The opinion of the lower appellate court indicates that, if it had been convinced that the arresting officer intentionally or negligently failed to obtain the identity of this available material witness, that court might have held differently as to the legal significance of his being permitted to leave the scene and resultant unavailability to the Petitioner. But Respondent's motives in letting this material witness depart, whatever they might have been, are really inconsequential, the decisive significance being that Petitioner un-

constitutionally was deprived, regardless of the motivation of the police, of the possible benefit of testimony from a presumably neutral witness to his alleged crime, and thus denied a fair trial.

Since the conduct of the trial judge herein, as endorsed and approved by the two appellate courts which reviewed his judicial performance, clearly ignored the spirit and intent of the *Roviaro* and *Johnson* decisions of this Court, *supra*, it is urged that the Petition for writ of certiorari be granted so as to permit an authoritative evaluation of the issue of whether or not Petitioner was fairly tried below, or whether his deprivation of access to the crucial testimony of the material witness worked upon Petitioner a denial of due process within the meaning of the Constitution.

The opinion of the lower appellate court, as adopted by the U. S. Court of Appeals, D. C., also contravenes the holdings of the Supreme Court of the United States in *Miranda v. Arizona*, 384 U.S. 436 (1966), in *Escobedo v. Illinois*, 378 U.S. 478 (1964), and in the prior decisions of this Court relating to the unconstitutional extraction of confessions, such as *Haynes v. Washington*, 373 U.S. 503 (1963). –

The trial record is clear that Petitioner denied having made any admission of guilt to the police either in the scout car or at headquarters. He also categorically denied having been advised of his rights by the police in both places of custodial interrogation. And, likewise, he expressly denied his guilt of having committed the homosexual offenses charged against him.

In the face of these express denials, the lower court of appeals took the highly questionable position, which the U. S. Court of Appeals, D. C. by implication has adopted, that not having specifically raised the issue of inadmissibility in the trial court under the ruling in *Escobedo*, the Petitioner thereby was precluded from raising such Constiturtional question on appeal.

How this position can be reconciled with the benefits afforded by the "plain error" provisions of Rule 52(b) of the Federal Rules of Criminal Procedure (18 U.S.C.A. 399)

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

is difficult to comprehend, since nothing could have been more prejudicial to Petitioner's rights and legal position than to be confronted with alleged admissions that he actually never made, and which, if made (which they were not), had been extracted from him in a manner clearly violative of his Constitutional rights.

The opinion of the D. C. Court of Appeals cites as its only local case authority on this point the late 1966 decision of that court in *Deans v. United States*, 374 F.2d 284 (1966). Such case, it is submitted, is of doubtful persuasive authority on the point, however, since the appellant in that case did not even mention on appeal the matter of the inadmissibility of his purported admission under *Escobedo*, and the point actually was raised by the D. C. Court of Appeals itself for the first time during the oral argument.

Certainly Petitioner should not have been irretrievably penalized by the tactics of his then counsel, who, as a matter of trial strategy, felt it ill-advised to raise any legal issue as to the admissibility in evidence of police testimony regarding Petitioner's alleged admissions, especially when he had denied committing the offenses, had denied admitting to the police that he had committed them, and had denied that the police had apprised him of his right to remain silent and to have the advice of legal counsel.

Furthermore, the lower appellate court took the erroneous position that Petitioner's attorney's failure to object to the admissibility of the alleged admissions, and to cross-examine the police respecting Petitioner's being advised of his rights, worked a waiver of the right to remain silent,

In this connection, the following excerpt from the opinion of the Supreme Court in *Westover v. United States*, 384 U.S. 494, which was a companion case to *Miranda, supra*, and decided simultaneously therewith, is highly pertinent:

> "We reverse. On the facts of this case we cannot find that Westover knowingly and intelligently waived the right to remain silent and his right to consult with counsel prior to the time he made the statement[69] * * *." (at p. 495)

And the language of Footnote 69 thereto is especially pertinent:

> "The failure of defense counsel to object to the introduction of the confession at trial, noted by the Court of Appeals and emphasized by the Solicitor General, *does not preclude our consideration of the issue*. Since the trial was held prior to our decision in *Escobedo*, and, of course, prior to our decision today making the objection available, the failure to object at trial does not constitute a waiver of the claim." (Emphasis supplied.) (at pp. 495-496)

So in the trial below of the case at bar, Petitioner's trial counsel, on May 12, 1966, unfortunately could not have anticipated the imminent new safeguards against the use of unreliable statements at trial which would be afforded criminal defendants by the *Miranda* decision, to be handed down by the Supreme Court less than one month thereafter. Hence, the conclusion of the lower appellate court that Petitioner "voluntarily, knowingly, and intelligently waived his right to remain silent," was, under the existing facts and circumstances, a legally improper and unsupportable one.

Also, the trial and appellate courts erroneously believed that the arresting officer told Petitioner that he was entitled to and offered him the services of counsel while Petitioner was riding in the patrol car, and that Petitioner knowingly waived his Constitutional right to an attorney by rejecting such offer, and then went on to "confess" his guilt by agreeing with the officer's account of what purportedly had transpired in the men's room. How access to legal counsel could possibly have been given to Petitioner while he was being transported in the patrol car to police headquarters is beyond comprehension. Nor can any waiver of Petitioner's right to counsel be presumed from the record below. "The

record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

In the instant case, Petitioner clearly was entitled to counsel, which right he did not intelligently waive. The situation in which he allegedly admitted his guilt (which he did not do) was coercive to say the least. Hence, the police testimony regarding such alleged confession should have been excluded by the trial judge, whether Petitioner's trial counsel had objected thereto or not, both on the basis of Petitioner's Fifth Amendment protection against compelled self-incrimination, and on his Sixth Amendment right to have the assistance of counsel for his defense.

As to the ostensible ambivalence of and inconsistency between Petitioner's denial that he committed the homosexual offenses in question or confessed having done so, and his contention that his "confession" was inadmissible on Constitutional grounds, the Court's attention is invited to the case of *Lee v. Mississippi*, 332 U.S. 742 (1948), wherein this Court reversed the highest court of Mississippi by holding that:

> "... a conviction resulting from . . . use of a coerced confession . . . is no less void because the accused testified at some point in the proceeding that he had never in fact confessed, voluntarily or involuntarily. Testimony of that nature can hardly legalize a procedure which conflicts with the accepted principles of due process." (at p. 745)

And see, also, the confirming Supreme Court decision in *Boles v. Stevenson*, 379 U.S. 43 (1964).

It is readily apparent from the foregoing that the instant case involves serious matters of Constitutional interpretation, and that there is a strong indication, deserving of careful consideration by the Supreme Court, that the trial and appellate courts below have misconstrued and misinterpreted the

holdings of a number of applicable decisions of the Supreme Court on the Constitutional issues here involved.

The interests of justice would demand, it is respectfully submitted, that our Highest Court permit this case to come before it, so as to give consideration thereto, and thus clarify the apparent confusion and misunderstanding which exist in the minds of the judges who have had this case before them for adjudication.

Not only is the professional reputation and career of the Petitioner at stake, but, far more importantly, there is involved in this matter the protection of innocent citizens from over-zealous enforcement officers and procedures, where unconstitutional means often are employed to achieve worthy legal objectives.

CONCLUSION

For the reasons set forth above, it is respectfully urged that this Petition for writ of certiorari should be granted.

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IN THE DISTRICT OF COLUMBIA
COURT OF GENERAL SESSIONS

DISTRICT OF COLUMBIA,

v. } Criminal Action
No. D.C. 9539-66

LOUIS D. REED,
Defendant.

TRANSCRIPT OF PROCEEDINGS
[Washington, D.C.; May 12, 1966]

FINDING

THE COURT [Neilson, J.]: Well, this is a most regrettable situation the Defendant finds himself in, to have an Officer take the stand, and there is no personal reason why he should falsify in this case. He doesn't know the Defendant and never knew him before, and witnessed the offense which is involved in the statute. It's as plain and as simple as that.

It is unfortunate, as I say, that the Defendant finds himself in this predicament; a man of his background, training, education and standing in the community with good friends. He should be a little bit more cautious and careful in his actions, especially in public places, which the statute covers.

In view of all of the evidence and the law in the case – the evidence including that of good character – there is no question about that; he has a good previous character. These doctors have come here; his good friends, to testify in his behalf, but it can't alter the facts.

The evidence seems to be clear and explicit. The offense was committed, as charged in this Information.

As much as I feel sorry for him – I would like to [42] help him, and sympathize with him – the evidence is here, uncontradicted as I see it, and I have to adjudge him guilty as charged, and impose a fine of one hundred dollars or thirty days in Jail.

* * *

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 4060

LOUIS D. REED, APPELLANT

v.

DISTRICT OF COLUMBIA, APPELLEE.

Appeal from the District of Columbia Court of General Sessions

(Argued December 19, 1966 Decided February 15, 1967)

Richard K. Lyon, with whom *Dimitri P. Mallios* was on the brief, for appellant.

Ted D. Kuemmerling, Assistant Corporation Counsel, with whom *Charles T. Duncan, Corporation Counsel, Milton D. Korman,* Principal Assistant Corporation Counsel, *Hubert B. Pair,* Assistant Corporation Counsel ,and *Richard W. Barton,* Assistant Corporation Counsel, were on the brief, for appellee.

Before Hood, Chief Judge, and Quinn and Myers, Associate Judges.

HOOD, *Chief Judge:* Appellant was convicted of committing a lewd, obscene and indecent act[1] in a rest room on the fourth floor of a downtown department store. He claims five errors.

First, it is argued that because the offense was of a homosexual nature, there was insufficient corroboration as required by Kelly v. United States, 90 U.S.App.D.C. 125, 194 F.2d 150 (1952). *Kelly* laid down the rule that the testimony of a single witness to a verbal invitation to sodomy should be received and considered with great caution,[2]

[1] D. C. Code 1961, § 22-1112(a)

[2] In the present case there was testimony as to three acts by appellant: (1) his exposure of himself in an indecent manner, (2) his touching the complaining witness, and (3) his remark which could be interpreted as an invitation to sodomy.

that in such cases evidence of good character is particularly applicable, and that the trial court in such cases should require corroboration of the circumstances surrounding the parties at the time "such as presence at the alleged time and place and similar provable circumstances." (90 U.S.App.D.C. at page 130, 194 F.2d at page 155.)

In the present case there was the testimony of only one witness to the act, a police officer in plain clothes. As *Kelly* was cited to the trial court in a motion for directed verdict at the close of the government's evidence and in final argument, we must assume that the trial court was fully aware of the rules announced in *Kelly* and that the testimony of the officer was received and considered with great caution.

With respect to corroboration of the presence of the officer and appellant at the time and place, it appears no corroboration was needed as appellant admitted being in the washroom when the officer entered.[3] In addition, there was testimony by another officer that he saw the arresting officer come out of the rest room with appellant in his custody.

Appellant's main argument with respect to corroboration is based upon the arresting officer's testimony that immediately prior to the arrest, an unidentified man, who was also in the rest room, left the room. Appellant argues that there was available to the government a "material witness to the alleged commission of the indecent act of appellant," and that because the arresting officer did not detain the witness, or obtain his name and address, it must be concluded that the witness's testimony would not have supported the officer's testimony. Appellant characterizes this as a "deliberate failure on the part of the police to avail themselves of this readily available source of corroboration." The weakness in this argument is that there is no solid foundation in the record to indicate that the second man witnessed the acts and conduct of appellant.

The only reference to the second man is the officer's statement that as he reached in his pocket for his badge preparatory to making the arrest, the second man immediately left. On cross-examination the officer stated he had no conversation with the second man and made no

[3] Appellant testified he entered the rest room about 8:00 p.m.; the officer testified that the arrest occurred at 8:40 p.m.; and appellant offered an explanation for his lengthy stay in the rest room.

attempt to stop him from leaving because he had committed no violation of the law. The officer was not asked on cross-examination if the second man saw or was in a position to see appellant's actions. Appellant in his testimony made no reference to the second man. On this record we are not willing to hold that the arresting officer intentionally or negligently failed to obtain the identity of a corroborating witness.

Appellant's second contention is that the trial court failed to find that appellant was entrapped. No claim of entrapment was advanced at trial and there is nothing in the record to support such a claim.

The third contention is that the police obtained a confession of guilt from the appellant in violation of his constitutional rights. This claim rests on the testimony of the arresting officer who testified without objection that when appellant was being taken to police headquarters in a police car, he first advised appellant "of his rights." Then, in the presence of two other policemen in the car, he recited the same facts to which he had testified and asked appellant if the facts were correctly stated. Appellant replied they were. The officer further testified without objection that at headquarters he asked appellant why he had acted as he did and appellant offered an explanation for so acting. A second officer corroborated both the conversation in the car and the one at headquarters.

Appellant insists that these admissions by appellant were inadmissible under the rulings in Escobedo v. Illinois, 378 U. S. 478 (1964), and Miranda v. Arizona, 384 U. S. 436 (1966). For several reasons we do not agree. *Miranda* applies only to trials begun after June 13, 1966,[4] and this case was tried in May 1966. With respect to *Escobedo,* it should be noted that the evidence complained of was received without objection or claim that it violated *Escobedo.*

Where an *Escobedo* question is not raised at trial, thereby affording consideration by the trial court, the question will not be considered on appeal.[5] Furthermore, even under

[4] Wright v. United States, D.C.App., 224 A.2d 475 (1966). See also Stith v. United States, U.S.App.D.C. , F.2d , decided January 24, 1967.

[5] Deans v. United States, U.S.App.D.C. , F.2d , decided December 21, 1966; United States v. Bolden, 355 F.2d 453 (7th Cir. 1965), *cert. denied,* 384 U. S. 1012 (1966); United States v. Miller, 353 F.2d 724 (2d Cir. 1965); Tyree v. United States, 351 F.2d 611 (5th Cir. 1965).

Miranda a defendant may waive his rights if the waiver is made "voluntarily, knowingly and intelligently." Here the officer testified that the admissions were made after appellant had been advised "of his rights." No attempt was made on cross-examination to have the officer elaborate on this statement. In view of the failure to object to the admissions and the failure to cross-examine respecting appellant being advised of his rights, the only conclusion is that appellant, a man of intelligence and education, voluntarily, knowingly and intelligently waived his right to remain silent.

The fourth claim of error asserts that the trial court failed to give sufficient weight to appellant's character witnesses. In reaching its finding of guilt, the trial court expressly commented upon the evidence of good character. It is evident that the trial court gave due consideration to the character evidence but found it outweighed by the direct testimony.

The final claim is that the trial court failed to permit appellant to explain his presence at the scene preceding his commission of the offense. Appellant testified to his activities on the day in question from 8:30 in the morning until 7:00 in the evening. At that point the trial court interrupted by asking what that testimony had to do with the issue before the court. Counsel replied that "we're just leading up to the events of why he was there." The court instructed counsel to "get down to the issue" and counsel without objection proceeded to ask appellant to tell what happened at the department store. Appellant then told what happened just prior to his entering the store and the occasion for his going to the rest room. If counsel wished to have appellant explain his presence in the vicinity of the store, he did not make his desire known to the trial court and made no proffer of the desired testimony. We find no error in this respect.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,796 September Term, 1967
D.C.C.A. 4060

Louis D. Reed,
Appellant,

v.

District of Columbia,
Appellee.

[Filed October 2, 1967]

JUDGMENT

This cause came on to be heard on the record on appeal from the District of Columbia Court of Appeals and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the District of Columbia Court of Appeals appealed from in this cause be, and it is hereby, affirmed. See *Reed v. District of Columbia*, 226 A.2d 581 (D.C.Ct.App. 1966).

Per Curiam.

Dated: October 2, 1967

[Filed December 22, 1967]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,796 September Term, 1967
D.C.C.A. 4060

Louis D. Reed,

Appellant,

v.

District of Columbia,

Appellee.

* * *

ORDER

The Clerk is directed to file the memorandum of National Capital Area Civil Liberties Defense and Education Fund, *micus curiae*, in support of petition for rehearing *en banc*, and on consideration whereof and on consideration of appellant's petition for rehearing *en banc* and of appellee's opposition thereto, it is

ORDERED by the Court *en banc* that appellant's aforesaid petition for rehearing *en banc* is denied.

Per Curiam.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS INVOLVED:

U. S. CONSTITUTION, AMENDMENT V – CAPITAL CRIMES; DOUBLE JEOPARDY; *SELF-INCRIMINATION;* DUE PROCESS; JUST COMPENSATION FOR PROPERTY.–

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation." [Emphasis supplied.]

U. S. CONSTITUTION, AMENDMENT VI – JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS.–

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, *and to be informed of the nature and cause of the accusation;* to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the assistance of counsel for his defense."* [Emphasis supplied.]

STATUTES INVOLVED:

D. C. CODE, § 22-1112(a), 67 Stat. 92, ch. 159, § 202(a)(1), June 29, 1953 – LEWD, INDECENT, OR OBSCENE ACTS. –

> "It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent

sexual proposal, *or to commit any other lewd, obscene, or indecent act in the District of Columbia,* under penalty of not more than $300 fine, or imprisonment of not more than ninety days, or both, for each and every such offense." [Emphasis supplied.]

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED:

Rule 52(b) –

> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

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BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1045

LOUIS D. REED, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

On petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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---

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Where, in the prosecution of an offense of a homosexual nature, evidence of petitioner's post arrest admissions was received without objection or claim that such evidence violated the doctrine and principles of *Escobedo* v. *Illinois,* and, upon conviction, the judgment was affirmed, first by the District of Columbia Court of Appeals and then by the United States Court of Appeals for the District of Columbia Circuit, should not this Court refuse to exercise its jurisdiction to review on writ of certiorari?

COUNTER-STATEMENT OF THE CASE

In an information filed in the Criminal Division of the District of Columbia Court of General Sessions, petitioner was charged with committing a lewd, obscene, and indecent act, in violation of the provisions of D. C. Code, § 22-1112(a) (1967) (J. A. 26).[1] Upon his plea of not guilty, petitioner was tried without a jury, found guilty of the offense, and sentenced to pay a fine of $100 or, in default thereof, to serve 30 days in jail (J. A. 27).

Petitioner appealed to the District of Columbia Court of Appeals, which unanimously affirmed the judgment of conviction. *Reed* v. *District of Columbia,* D. C. App., 226 A. 2d 581 (1966). Thereafter, the United States Court of Appeals for the District of Columbia Circuit allowed an appeal and, following briefing and oral argument, affirmed, on October 2, 1967, the judgment of the District of Columbia Court of Appeals. On December 22, 1967, the United States Court of Appeals denied unanimously a petition for rehearing *en banc.*

The evidence adduced at trial was, in substance, as follows:

On January 13, 1966, at about 8:40 p.m., because of complaints from the management of the Woodward and Lothrop Department Store that its rest rooms were being frequented by sex deviates, Officer Graham of the Metropolitan Police Department made a routine check of its fourth floor men's rest room (J. A. 2, 4). Upon his arrival there with two fellow officers, Officer Graham, wearing "plain clothes," entered the rest room while the other officers waited outside (J. A. 2-3, 5).

As he entered, Officer Graham observed petitioner standing inside. Petitioner then "walked to a urinal, stood at the urinal, and clearly and openly fondled his erect penis." A short time later, petitioner "turned away from the

[1] References herein to "J. A." are to the joint appendix filed in the United States Court of Appeals for the District of Columbia Circuit and made a part of the record in this Court.

urinal, walked to where * * * [Graham] was standing, touched * * * [his] privates through * * * [his] trousers, and grabbed * * * [his] hand and said, 'Come on.'" (J. A. 2.)

Pulling away from petitioner, Graham reached into his pocket for his police badge. As he did so, an unidentified man who had been standing at another urinal "immediately left." Petitioner then "quickly walked back to the urinal," whereupon the officer identified himself and placed petitioner under arrest. Graham testified that "Mr. Reed became very nervous and attempted to brush me aside in an attempt to get to the door." (J. A. 2.)

Graham further testified that, as he escorted petitioner to Police Headquarters in a police vehicle,

> "* * * I advised * * * [petitioner] of his rights, and then, in the presence of Lt. Fochett, Pvt. Drouillard and * * * [petitioner], I recited the facts of the case, as I have recited them to Your Honor, to Lt. Fochett, and asked * * * [petitioner] if the facts that I had recited were correct or incorrect, and he stated that the facts were correct.
>
> "At the Morals Division office, I asked * * * [petitioner] why he acted as he did, and he stated to me, 'that he had a desire to engage in a sex act,' and he attributed this to the fact that his wife, at that time, was pregnant and he hadn't had sex relations with her for some time." (J. A. 3.)

Officer Drouillard of the Metropolitan Police Department testified that he and Lt. Fochett accompanied Officer Graham to the fourth floor men's rest room, which Graham entered as they waited outside. A few minutes after Graham entered, he was observed coming out with petitioner in his custody. Drouillard heard Graham advise petitioner "of his rights" and recount the events which

occurred inside the rest room. He heard petitioner admit on two occasions that the facts constituting the offense, as related by Graham, were correct, and that he had committed the offense because his wife was then "four months' pregnant [and] * * * he hadn't had sex with his wife for a long time." (J. A. 7.)

Petitioner testified in his own behalf that, on the evening of January 13, 1966, at about 8:00 p.m., while in the vicinity of the Woodward and Lothrop Department Store, "* * * I had some cramps and realized I had to go to the bathroom" (J. A. 10-11). He entered the building, inquired of a clerk as to the location of a rest room, and was directed to the fourth floor (J. A. 11). He remained in the fourth floor rest room for 40 minutes attending to his physical needs (J. A. 2, 10).

Petitioner said that he had been standing at a urinal and, as he turned away from it, he first noticed Officer Graham in the rest room (J. A. 13). He testified:

> "* * * as I was leaving the urinal to leave the Rest Room, Officer Graham stopped me, and I said, 'Come on,' and he said, 'Don't give me any trouble because I don't want to use the handcuffs again tonight.'" (J. A. 11.)

Petitioner stated that he was then arrested and asked to show some identification, after which he was escorted to a police cruiser (J. A. 11-12). He admitted that he was interrogated by the officers and that he told them that his wife was pregnant, but he denied that he had been "advised of * * * [his] rights" or that he made any admissions relative to the offense charged (J. A. 12). Upon his arrival at police headquarters, petitioner was again interrogated and then charged with the offense of "disorderly conduct for loitering" (J. A. 12, 30). Petitioner telephoned his brother, who came to police headquarters and posted

$25 collateral,[2] whereupon petitioner was released (J. A. 13).

At trial petitioner presented four witnesses on his behalf who testified that he has a good reputation for "truth and veracity" (J. A. 16, 18, 20, 22). None of these witnesses was asked to testify as to his reputation for good morals or for an absence of homosexual tendencies.

REASONS WHY THE WRIT SHOULD BE DENIED

The decision of the court below is not in conflict with any applicable decision of this Court.

I

Citing and relying upon *Roviaro* v. *United States,* 353 U. S. 53 (1957), petitioner asserts a denial of due process on the ground that he was deprived "* * * of the possible benefit of testimony from a presumably neutral witness to his alleged crime, and thus denied a fair trial" (petition, p. 9).

There is nothing in the record to suggest that the alleged eyewitness was, in fact, an eyewitness. Petitioner thus speaks only of "the possible benefit" of the testimony of such unidentified person. In rejecting the same argument, the District of Columbia Court of Appeals said:

> "The only reference to the second man [the alleged eyewitness] is the officer's statement that as he reached in his pocket for a badge preparatory to making the arrest, the second man immediately left. On cross-examination the officer stated he had no conversation with the second man and made no attempt to stop him from leaving because he had committed no violation of the

[2] Not until thirty-five days after petitioner posted and elected to forfeit his collateral did he move to set aside the forfeiture (J. A. 30-31). The Government made no objection to his motion, notwithstanding the thirty-day limitation thereon provided for by Criminal Rule 3(d), District of Columbia Court of General Sessions.

law. The officer was not asked on cross-examination if the second man saw or was in a position to see * * * [petitioner's] actions. * * * [Petitioner] in his testimony made no reference to the second man. On this record we are not willing to hold that the arresting officer intentionally or negligently failed to obtain the identity of a corroborating witness." *Reed* v. *District of Columbia, supra,* at p. 583.

II

Petitioner alleges that receipt into evidence of police testimony respecting his uncounseled admissions violated the principles of *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), and *Westover* v. *United States,* 384 U. S. 494 (1966). But plainly it did not. Even though petitioner had been "advised * * * of his rights" (J. A. 3), he made no request for counsel.[3] The record shows that petitioner was given permission to use the telephone, but it nowhere indicates that he either called, or attempted to call, an attorney. He telephoned his brother and asked him to bring money to police headquarters so that he could obtain his release by posting collateral (J. A. 13).

Even assuming, *arguendo,* that petitioner had *not* been apprised of his right to counsel, the rule of *Escobedo* was not controlling since the record shows that he made no request for counsel. As the Court there said (378 U. S. at 490-491):

"We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, *the suspect has re-*

[3] No *Miranda* question is here involved because the trial was completed prior to the date of *Miranda* v. *Arizona,* 384 U. S. 436 (1966). See *Johnson* v. *New Jersey,* 384 U. S. 719 (1966).

> *quested* and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution * * *." [Emphasis supplied.]

See also: *Johnson* v. *New Jersey,* 384 U. S. 719, 734 (1966). Compare: *United States* v. *Childress,* 347 F. 2d 448 (7th Cir., 1965), *cert. den.* 384 U. S. 1012 (1966); *United States* v. *Percodani,* 363 F. 2d 867 (2nd Cir., 1966); *United States* v. *Ardner,* 364 F. 2d 719 (4th Cir., 1966), *cert. den.* 385 U. S. 884 (1966); *Von Schmitt* v. *United States,* 366 F. 2d 773 (9th Cir., 1966); *Stith* v. *United States,* —— U. S. App. D. C. ——, 374 F. 2d 309 (1967); *Hintz* v. *Beto,* 379 F. 2d 937 (5th Cir., 1967).

Petitioner, in asserting that he did not waive his right to remain silent, cites and relies upon this Court's decision in *Westover* v. *United States,* 384 U. S. 494 (1966). However, the facts in that case are readily distinguishable from those in the case at bar. There, appellant had been arrested as a robbery suspect. After being taken into custody by Kansas City police, he was first questioned on the evening of his arrest and, later, during the following morning. On both occasions he denied any involvement in the crime. At no time was he given "appropriate warnings" by the Kansas City police.

Following interrogation by local police, appellant was interrogated by FBI agents for two and a half hours and, thereafter, he signed written confessions.

In reversing Westover's conviction, this Court said:

> "* * * There is no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced its interrogation. The record simply shows that the defendant did in

> fact confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed." *Id.* at p. 496.

In the case at bar, there was credible evidence from which the court could have found that petitioner was "advised of his rights" prior to any interrogation (J. A. 2-3) and that the interrogation was of very brief duration. Petitioner was arrested at 8:40 p.m., transported to police headquarters, interrogated, booked, and permitted to call his brother, who came to headquarters with funds with which he could post collateral. At 9:40 p.m., one hour after his arrest, petitioner posted collateral and obtained his release from custody. (J. A. 2-3, 7, 11-13, 30.)

In disposing of petitioner's claim that he had not waived his right to remain silent, the District of Columbia Court of Appeals said:

> "* * * Here the officer testified that the admissions were made after * * * [petitioner] had been advised 'of his rights.' No attempt was made on cross-examination to have the officer elaborate on this statement. In view of the failure to object to the admissions and the failure to cross-examine respecting * * * [petitioner] being advised of his rights, the only conclusion is that * * * [petitioner], a man of intelligence and education, voluntarily, knowingly and intelligently waived his right to remain silent." 226 A. 2d at 584.

Petitioner urged, for the first time on appeal, in the District of Columbia Court of Appeals that police testimony respecting his uncounseled admissions was improperly received into evidence. He reasserts the same argument here.

In disposing of this argument, the District of Columbia Court of Appeals said, *inter alia:*

> "Where an *Escobedo* question is not raised at trial, thereby affording consideration by the trial court, the question will not be considered on appeal. * * *" 226 A. 2d at 584.

This holding is consistent with the decisions of many federal courts. See, e.g., *Robbins* v. *United States,* 345 F. 2d 930 (9th Cir., 1965); *Tyree* v. *United States,* 351 F. 2d 611 (5th Cir., 1965), *cert. den.* 385 U. S. 871 (1966); *United States* v. *Miller,* 353 F. 2d 724 (2nd Cir., 1965); *United States* v. *Bolden,* 355 F. 2d 453 (7th Cir., 1965), *cert. den.* 384 U. S. 1012 (1966); *Deans* v. *United States,* —— U. S. App. D. C. ——, 374 F. 2d 284 (1966). Cf. *Schmerber* v. *California,* 384 U. S. 757, 765-766, n. 9 (1966).

CONCLUSION

Since, as demonstrated, the decision of the court below is not, as alleged, in conflict with any applicable decision of this Court, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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